



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

May 31, 1996

BY HAND

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, Room 222
Washington, D.C. 20554

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MAY 31 1996


Re: Amendment of the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, IB Docket No. 95-41

Dear Mr. Caton:

The Office of Advocacy of the Small Business Administration transmits herewith the original and 11 copies of its reply to oppositions to petitions to reconsider the Report and Order in the above-referenced docket. Included with this package is a duplicate "file copy" of this pleading. Please date stamp this copy and return it to the messenger delivering this filing.

Thank you in advance for your assistance in this matter. If you have any questions, please contact me or David Zesiger at 202/205-6532.

Respectfully submitted,


Jere W. Glover
Chief Counsel

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OFFICE OF CHIEF COUNSEL FOR ADVOCACY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)

Amendment of the Commission's)

Regulatory Policies Governing)

Domestic Fixed Satellites and)

Separate International Satellite)

Systems)

IB Docket No. 95-41

DOCKET FILE COPY ORIGINAL

To: The Commission

REPLY OF THE CHIEF COUNSEL FOR ADVOCACY
OF THE UNITED STATES SMALL BUSINESS ADMINISTRATION
TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

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May 31, 1996



TABLE OF CONTENTS

	Page
I. THE COMMISSION'S TWO STAGE FINANCIAL QUALIFICATION PROCESS SHOULD BE MAINTAINED	2
II. ELIMINATING THE TWO STAGE FINANCIAL QUALIFICATION PROCESS IS UNNECESSARY TO AVOID WAREHOUSING	3
III. THE TWO STAGE FINANCIAL QUALIFICATION PROCESS IS NECESSARY TO OFFSET THE DISPROPORTIONATE BURDEN THE COMMISSION'S FINANCIAL QUALIFICATION RULES IMPOSE ON SMALLER, SELF-FUNDED ENTITIES	5
IV. THE ORDER'S FINAL REGULATORY FLEXIBILITY ANALYSIS FAILS TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT	8
V. CONCLUSION	9

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REPLY OF THE CHIEF COUNSEL FOR ADVOCACY
OF THE UNITED STATES SMALL BUSINESS ADMINISTRATION
TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION

The Office of Advocacy of the United States Small Business Administration replies to the oppositions of Hughes Communications Galaxy, Inc. ("Hughes") and GE American Communications, Inc. ("GE Americom") to the petitions for reconsideration filed by Columbia Communications Corporation ("Columbia"), Orion Network Systems, Inc. ("Orion"), and PanAmSat Corporation ("PanAmSat") of the Commission's Report and Order in the above-captioned proceeding, released January 22, 1996, in which the Commission amended its regulations governing domestic fixed satellites and separate international satellite systems ("Report and Order").¹ The Office of Advocacy supports the petitions to reconsider and

¹Amendment of Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems, Report and Order, IB Docket No. 95-41, FCC 96-14, (released January 22, 1996) ("Report and Order").

disputes the oppositions filed against them.

**I. THE COMMISSION'S TWO STAGE FINANCIAL QUALIFICATION PROCESS
SHOULD BE MAINTAINED**

The Office of Advocacy is principally concerned with the Report and Order's proposed elimination of the Commission's two-stage financial qualification process.² The Office of Advocacy believes that the Commission should not eliminate a process that has played such a pivotal role in opening the satellite industry to smaller competitors over the past decade.³ Since the Commission's establishment of a two-stage financial qualification process for separate satellite systems in 1986, a number of smaller satellite operators have successfully entered the satellite services market. These fledgling new entrants have grown into viable businesses in a market in which many assumed was all but impossible for small competitors to compete effectively.

²Id. at para. 35-43.

³The Office of Advocacy has consistently supported more reasonable financial qualification standards for smaller satellite operators. See, e.g. Letter from Frank S. Swain, Chief Counsel to William J. Tricarico, dated June 27, 1985 (referencing FCC Docket No. 85-135) and Letter from Jere W. Glover, Chief Counsel to Chairman Reed E. Hundt dated 4/24/96 (regarding an application for a Big LEO license).

II. ELIMINATING THE TWO STAGE FINANCIAL QUALIFICATION PROCESS IS UNNECESSARY TO AVOID WAREHOUSING

Chief among the rationales the Report and Order offers for eliminating the two-stage financial qualification process is the purported threat of "warehousing" or hoarding of satellite licenses without building the required satellite systems. Its concern is that applicants with inadequate financial backing could be awarded licenses and fail to build them out, thus precluding financially qualified applicants from using the orbital spectrum for years. To substantiate the concern of warehousing, the Commission and opposing parties cite, collectively, six cases in which the licensee failed to construct, launch and operate a satellite system.⁴ The majority of these cases, however, date to the mid-1980's and involve applications that predated the financial qualification showing currently at issue. Moreover, the licenses in question were issued for domestic service and thus in no case would they have implicated the two-stage process at issue here. These were some of the cases that, in part, gave rise to the Commission's 1985 rules on domestic fixed and separate international satellite systems.⁵ Of course, such examples cannot be used to assert the success or failure of the two-stage showing at issue here. Other

⁴Report and Order at para. 40, footnote 57; Hughes Opposition at footnote 11.

⁵See Licensing Space Stations in the Domestic Fixed-Satellite Service, Report and Order, 58 R.R. 2d 1267 (1985) and Establishment of Satellite Systems Providing International Communications, Report and Order, 101 F.C.C. 2d 1046 (1985).

examples cited as failures of applicants approved under the two-stage process to build their systems involve other services (such as Ka band) where, again, the viability of a two-stage showing was not in question.

It is not just smaller, self-funded system operators that in some cases have struggled to build their systems. There are also cases of larger, self-funded system operators that have failed to build their systems.⁶ It is clear that these are isolated cases and not indicative of a failure of the Commission's financial qualification rules generally, nor of a need to guard against some ill-defined threat of warehousing.

These few cases fail to establish a record of warehousing that would justify the abandonment by the Commission of such a successful and important policy as the two stage financial qualification process. In fact, the reverse is true. The two-stage process is largely responsible for one of the biggest pro-competitive successes of the Commission's satellite policies in the past ten years -- the development of successful separate international satellite systems -- and should therefore be maintained.

Moreover, if warehousing is the chief problem the Commission is attempting to correct by eliminating the two-stage process, there are clearly more direct and

⁶Columbia Petition at p.13, footnote 21, referencing the failure of Ford Aerospace and Western Union to build their systems in the late 1980s.

significantly less burdensome alternatives that would accomplish the same purpose. For example, the Commission could tighten up its enforcement of its milestones for the financing and construction of satellite systems. Such a rule would have the added effect of treating all parties in the same manner, unlike the elimination of the two stage financial showing. The Report and Order fails to analyze any such alternatives that could lessen the impact of this rule change on smaller satellite entities.

III. THE TWO STAGE FINANCIAL QUALIFICATION PROCESS IS NECESSARY TO OFFSET THE DISPROPORTIONATE BURDEN THE COMMISSION'S FINANCIAL QUALIFICATION RULES IMPOSE ON SMALLER, SELF-FUNDED ENTITIES

The Commission should not eliminate the two stage financial qualification process because it is the only rule that offsets the inherent advantage the Commission's rules give to larger, self-financed entities over small, externally-financed entities. The Report and Order purports to equalize the qualifying process for all applicants by applying the single stage financial qualification process to all parties. In reality, the Commission's rules prescribe two extremely different financial qualification processes for the two types of applicants.⁷

⁷See 47 C.F.R. section 25.140(d).

According to the Commission's rules, large, self-funded applicants must simply demonstrate "current assets and operating income sufficient" to construct, launch and operate its satellite for one year.⁸ In practice, this involves the submission of a balance sheet and a statement by a high corporate officer that management intends to support the proposal. The assets and income are not required to be irrevocably committed to the project. In fact, the Commission has accepted representations from large self-funded applicants that are expressly conditioned on unspecified contingencies⁹

In contrast, non-self-funded applicants must demonstrate "fully negotiated" loan, equity and grant commitments from external sources. The applicant must specify in detail a number of terms and conditions for each of the agreements on which it is relying. The rules for non-self-funding applicants conclude with a blanket rejection of any financing arrangements "contingent on further performance by either party."¹⁰

The anomaly arises because the Commission's rules allow a self-funded applicant to build a satellite system relying on funding sources other than those it presented to the Commission to obtain the license. In practice, this allows self-

⁸Id. at section 25.140(d)(1).

⁹See Orion Petition for Reconsideration, Appendix A, correspondence from Loral Corporation and TRW to the Commission.

¹⁰Id. at section 25.140(d)(2)(iv).

funded applicants to acquire a license prior to approaching the capital markets for external funding. This gives self-funded applicants an enormous advantage in dealing with lenders and investors.

The real importance of the two-stage financing is that it offsets this inherent advantage enjoyed by large, self-funded entities under the Commission's rules. The two step showing allows smaller companies to acquire at least a construction permit with which to approach external funding sources (as well as to complete the Intelsat consultative process).

In reality, virtually all successful applicants rely on external financing that is not fully negotiated. The Commission's rules set up a false dichotomy between internally and externally financed applicants, for most applicants are externally financed to a significant degree. For the Commission, in effect, to exclude smaller applicants from this process while at the same time openly allowing the largest applicants to take advantage of it imposes an unfair and undue burden on smaller entities.

Short of revamping the Commission's rules on self-funded and non-self-funded applicants, there is little practical way to offset this inequality other than to retain the two-stage financial qualification process. For this reason as well, the Commission should retain its two stage financial qualification process.

IV. THE ORDER'S FINAL REGULATORY FLEXIBILITY ANALYSIS FAILS TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT

The Report and Order's Final Regulatory Flexibility Analysis (FRFA) fails to meet the most basic requirements for a FRFA set forth in the Regulatory Flexibility Act of 1980.¹¹ The FRFA does not make a single specific reference to any of the rules proposed in the Report and Order and how small business concerns were considered in the development of those rules. While the proposed elimination of the two-stage financial qualification process is clearly of interest to any small business satellite provider, the FRFA makes no reference to any of the issues raised in that discussion. More importantly, nothing in the Report and Order's discussion of the elimination of the two-stage financial qualification process attempted to address the issue from a small entity's perspective.¹²

Moreover, the FRFA fails to discuss specifically any "significant alternatives" that the Commission considered that would "minimize any significant economic impact of the rule on small entities" nor did it discuss why any such alternative

¹¹The Regulatory Flexibility Act of 1980, Pub. L. No. 96-354, 94 Stat. 1164 (1980), codified at 5 U.S.C. sec. 601, et seq.

¹²The one exception being a tangential reference to how the Commission is "sympathetic to small companies without large corporate parents...." Report and Order at para. 40. Needless to say, the Regulatory Flexibility Act requires agencies to undertake substantive policy analysis, not offer hollow gestures of sympathy.

was rejected, as required by the Regulatory Flexibility Act.¹³ In fact, the elimination of the two-stage financial qualification process actually removes the principal alternative designed to reduce the impact of the Commission's rules on smaller entities.

Finally, the FRFA appears to have been mistakenly borrowed from an earlier Commission order (specifically, the Commission's Big LEO Order) and placed in the Report and Order with no changes or edits whatsoever. The two FRFAs are identical save for the paragraph numbers (see attachments A and B). The FRFA in the Report and Order even references "rules that will permit Big LEO systems to be licensed"¹⁴ -- clearly a reference to the wrong set of rules.

V. CONCLUSION

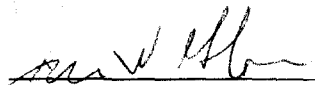
The two stage financial qualification process has played a crucial role in opening up the satellite services market to smaller competitors. It has succeeded largely in bringing competition to the international satellite market without incurring the risk of misuse of scarce orbital resources through warehousing. The Commission should retain the two part financial qualification process as a part of its newly unified satellite services policy in this docket.

¹³5 U.S.C. section 604(a)(3).


¹⁴Report and Order at para. 225.

For the foregoing reasons, the Office of Advocacy respectfully recommends the Commission grant the petitions to reconsider its Report and Order in IB Docket No. 95-41 and reject the oppositions filed thereto.

Respectfully submitted,



Jere W. Glover
Chief Counsel



David W. Zesiger
Assistant Chief Counsel

A P P E N D I C E S

APPENDIX A

FRFA from Report and Order in IB Docket No. 95-41

IV. Final Regulatory Flexibility Analysis

75. Need for Rules and Objective. We have codified proposed rules that will permit Big LEO systems to be licensed. Our objectives have been to promote efficiency and innovation in the licensing and use of the electromagnetic spectrum, to develop competitive and innovative communications systems, and to promote effective and adaptive regulations.

76. Issues Raised by the Public in Response to the Initial Analysis. No comments were received specifically in response to the Initial Regulatory Flexibility Analysis. We have, however, taken into account all issues raised by the public in response to the proposed rules. In certain instances, we have eliminated or modified our proposed rules in response those comments.

77. Alternatives that Would Lessen Impact. The minimal regulatory burden that we have imposed is necessary in order to carry out our duties under the Communications Act and other Federal statutes. We will continue to examine these requirements in an effort to eliminate unnecessary regulations and to minimize significant economic impact on small businesses.

IV. FINAL REGULATORY FLEXIBILITY ANALYSIS

225. Need for Rules and Objective. We have codified proposed rules that will permit Big LEO systems to be licensed. Our objectives have been to promote efficiency and innovation in the licensing and use of the electromagnetic spectrum, to develop competitive and innovative communications systems, and to promote effective and adaptive regulations.

226. Issues Raised by the Public in Response to the Initial Analysis. No comments were received specifically in response to the Initial Regulatory Flexibility Analysis. We have, however, taken into account all issues raised by the public in response to the proposed rules. In certain instances, we have eliminated or modified our proposed rules in response to those comments.

227. Alternatives that would Lessen Impact. The minimal regulatory burden that we have imposed is necessary in order to carry out our duties under the Communications Act and other Federal statutes. We will continue to examine these requirements in an effort to eliminate unnecessary regulations and to minimize significant economic impact on small businesses.

CERTIFICATE OF SERVICE

I, Jeanne K. Bishel, hereby certify that on this 3/5 day of May, 1996, a copy of the foregoing reply of the Chief Counsel for Advocacy of the United States Small Business Administration to Oppositions to Petitions for Reconsideration was served by first class mail, postage prepaid addressed to the following:

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